

[filed 05-14-93]

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF VIRGINIA  
AT ROANOKE

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. CR-92-90-R
	:	
JAMES F. WOODS;	:	Judge Jackson L. Kiser
JAMES L. GARNER, SR.; and	:	
EDGAR J. DOBBINS,	:	
	:	
Defendants.	:	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF  
THE ADMISSION OF NOTES MADE BY ERNEST A. ALLEN

The United States submits this Memorandum in support of its position that certain notes made by Ernest A. Allen, in which he memorialized statements attributable to defendant Woods, are admissible under Rule 801(d)(1)(B) of the Federal Rules of Evidence ("Rule 801(d)(1)(B)") once the defendants have impeached Allen's credibility.

I

ALLEN'S NOTES

In late summer or early fall of 1984, Allen wrote 13 pages of notes in which he memorialized certain events, including statements made to him by defendant Woods concerning Woods' involvement in bid rigging, price fixing, and market allocation. Allen began writing these notes at the suggestion of a close friend and mentor -- "Red" Stallings. The notes were intended to document certain bidding and pricing improprieties that Allen

observed while he was employed by Meadow Gold at the Beckley, West Virginia plant.

In substance, the notes memorialize concerns that Allen had about things that were happening at the Beckley, West Virginia plant. Allen visited Stallings in late summer 1984 to discuss his concerns about certain school bid and other improprieties of which Allen had become aware. Stallings told Allen that he shared Allen's concerns and advised Allen that he should begin to make notes. Allen heeded Stallings' advice and began to make the notes in question shortly after visiting Stallings.

A significant portion of the notes were written contemporaneously (or near contemporaneously) with the events and statements memorialized. The remainder of the notes concern events that were more removed in time and represent a "catching-up" effort. In large part, the notes are based on statements made by defendant Woods to Allen. Allen stopped writing notes in October 1984, after he had been replaced as general manager of the Beckley, West Virginia plant and his contact with Woods had become minimal.

In short, the notes contain statements made by Woods to Allen that are properly characterized as admissions by a party opponent under Rule 801(d)(2)(A) of the Federal Rules of Evidence ("Rule 801(d)(2)(A)").

## II

### THE APPLICABLE LAW

Rule 801 (d) (1) (B) provides, in pertinent part:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

Fed. R. Evid. 801(d) (1) (B) .

Unlike the common law, Rule 801(d) (1) (B) admits prior consistent statements as substantive evidence. United States v. Miller, 874 F.2d 1255, 1273 (9th Cir. 1989); United States v. Casoni, 950 F.2d 893, 905 (3d Cir. 1991). Thus, Rule 801(d) (1) (B) does not limit the admissibility of prior consistent statements solely for the use of rehabilitation. Id. and n. 11. It is axiomatic that a witness has to be impeached before prior consistent statements are admissible under Rule 801(d) (1) (B). United States v. Bolick, 917 F.2d 135, 137 (4th Cir. 1990).

When a defense attorney pursues a line of questioning or argument that impugns the motives of a witness, that attorney "assumes the risk that the [United States] will introduce rebuttal evidence under Rule 801(d) (1) (B)." Montague, 958 F.2d

at 1096. See United States v. Simmons, 567 F.2d 314, 321-22 (7th Cir. 1977). Whether or not a defense attorney intended to impeach the declarant's motives is irrelevant. United States v. Baron, 602 F.2d 1248, 1253 (7th Cir. 1979). "Even where the suggestion of contradiction is only imputation of an inaccurate memory, a prior consistent statement is admissible to rebut the inference." United States v. Coleman, 631 F.2d 908, 914 (D.C. Cir. 1980).

A. TREATMENT OF THE REQUIREMENT THAT A MOTIVE  
TO FABRICATE PRECEDE PRIOR CONSISTENT STATEMENTS

The United States anticipates that the defendants may raise an argument that Allen had a motive to fabricate the events memorialized in the notes when such notes were written. For reasons discussed below, any argument along these lines is not well taken. Nevertheless, this issue is discussed herein.

There is a considerable split in the Circuit Courts of Appeal as to whether prior consistent statements need be made at a time when the declarant did not have a motive to fabricate the statements in issue. See, e.g., United States v. Montague, 958 F.2d 1094, 1097-98 (D.C.Cir. 1992) (collecting cases and discussing differences in the circuit courts of appeal). A review of the caselaw in the Fourth Circuit suggests that it is an open issue in this Circuit as to whether Allen's prior consistent statements -- his notes -- must precede a motive to fabricate to be admissible as substantive evidence under Rule 801(d)(1)(B). There is no question, however, that Allen's notes can be used to rehabilitate Allen, as provided under the Rule

801(d)(1)(B), once Allen's credibility has been impeached.

Parodi, 703 F.2d at 784-87.

1. Treatment In The Fourth Circuit

In United States v. Parodi, 703 F.2d 768 (4th Cir. 1983), the Fourth Circuit stated:

proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B), or under traditional federal rules, irrespective of whether there was a motive to fabricate.

Id. at 784.

The Court in Parodi held that Rule 801(d)(1)(B) permits the use of prior consistent statements to rehabilitate a witness after such witness has been impeached, whether or not the witness had a motive to fabricate when he made the prior consistent statements. Id. at 784-85. Although the Parodi Court did not squarely address the issue when prior consistent statements are admissible as substantive evidence under Rule 801(d)(1)(B), the sweeping language used by the Court strongly suggests that prior consistent statements are admissible under this Rule irrespective of whether a declarant had a motive to fabricate at the time such statements were made. See Miller, 874 F.2d at 1273 n. 10 (wherein the Court stated: "close examination of [Parodi] reveals that [it does] not draw any distinction based on the purpose for which a prior consistent statement is offered. Rather, [Parodi] rejects entirely the requirement that there have been no motive to fabricate." (emphasis original))

In United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), the defendant's cross-examination of a government witness (a co-conspirator who entered into a plea agreement) raised the suggestion that the government witness fabricated his allegations in return for leniency. Id. at 138. After refreshing the government witness' memory on redirect examination, the prosecutor then preceded to rehabilitate the government witness further by having an FBI agent testify concerning prior consistent statements which the government witness made to the agent. Id. The Henderson Court, relying on United States v. Weil, 561 F.2d 1109 (4th Cir. 1977), held that the FBI agent's testimony was admissible as a prior consistent statement. Id. at 138-39. The Court in Henderson stated that "[t]he holding in Parodi . . . is fully consistent with our decision in the present case." As was the case in Parodi, however, the Henderson Court did not reach the issue as to when prior consistent statements are admissible as substantive evidence under Rule 801(d)(1)(B).

In United States v. Bolick, the Fourth Circuit acknowledged that there is considerable authority for the proposition that "the requirements of Rule 801(d)(1)(B) must be met only when a prior statement is offered for its truth and that general principles of trial discretion apply when a statement is admitted for some other purpose such as rehabilitation or background." Id. at 138. In a puzzling statement, in view of Parodi, the Bolick Court stated that the Fourth Circuit has not addressed this issue directly -- although the Court in Bolick did

acknowledge that "we may have endorsed the proposition in [Parodi]." Id. (citations omitted). The Bolick Court assumed, for the benefit of discussion, that the prior consistent statements were admitted "as rehabilitation and that they were not subject to the requirements of Rule 801(d)(1)(B)." Id. Ultimately, the Court in Bolick held that the admission of the prior consistent statements was improper because the declarant had not been impeached before such statements were admitted. Id. at 138. Consequently, the Bolick never reached the issue as to when prior consistent statements are admissible as substantive evidence under Rule 801(d)(1)(B).

In short, the cases referred to above suggest that it is an open issue in the Fourth Circuit as to whether Allen's prior consistent statements -- his notes -- must precede a motive fabricate to be admissible as substantive evidence under Rule 801(d)(1)(B). There is no question, however, that Allen's notes can be used to rehabilitate Allen once his credibility has been impeached. Parodi, 703 F.2d at 784-87.

## 2. Treatment In Other Circuits

The following Circuit Courts have held that prior consistent statements are admissible regardless of whether the declarant had a motive to fabricate when such statements were made: the District of Columbia Circuit; the Ninth Circuit; the Eleventh Circuit; and the Fifth Circuit. See Montague, 958 F.2d at 1097-98; Miller, 874 F.2d at 1273; United States v. Pendas-Martinez, 845 F.2d 938, 942 n.6 (11th Cir. 1988); United

States v. Parry, 649 F.2d 292, 295-96 (5th Cir. 1981). Cf. United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982), in which the Sixth Circuit stated that it favored a "more relaxed standard of admissibility under Rule 801(d)(1)(B)" and explained that the relationship between the timing of prior consistent statements and the inception of a motive to fabricate is a question of materiality, "not as a hard and fast rule for admissibility."

In Montague, the Court of Appeals for the District of Columbia reviewed the different positions taken by the Circuit Courts and held: "We join the Fifth and Eleventh Circuits in holding that the prior consistent statement need not have preceded the appearance of the motive [to fabricate] in order to render the statement non-hearsay under Rule 801(d)(1)(B). In so holding, the Court in Montague explained that the proper approach is for the trial court to analyze the prior consistent statement in terms of Rules 401 (relevance) and 403 (prejudice) of the Federal Rules of Evidence: "[t]he fact that a prior consistent statement was made after the appearance of a motive to fabricate does not render it per se outside the terms of Rule 801(d)(1)(B)." Id. at 1099.

In Miller, the Ninth Circuit expressly rejected the distinction drawn by those courts which have held that the "requirement" that the declarant have no motive to fabricate when the prior consistent statements are made applies only when a such statements are offered as substantive evidence, and not when such



statements are offered solely for purposes of rehabilitation.  
Id. at 1272. But see United States v. Brennan, 798 F.2d 581,  
587-88 (2d Cir. 1986); United States v. Harris, 761 F.2d 394,  
398-400 (7th Cir. 1985). The Miller Court stated:

The Rule goes one step further than the common law and admits all [prior consistent] statements as substantive evidence. The Rule thus does not change the type of statements that may be admitted; its only effect is to admit these statements as substantive evidence rather than for the purpose of rehabilitation. Accordingly, it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness; any such statement is admissible as substantive evidence under Rule 801(d)(1)(B). In short, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all.

Id. at 1273.

The Miller Court explained that any requirement that the declarant have no motive to fabricate when the prior consistent statements are made is rooted in Rules 401 and 403 of the Federal Rules of Evidence -- not in Rule 801(d)(1)(B). Miller, 874 F.2d at 1274. Accordingly, whether the declarant's motive to fabricate preceded the prior consistent statements is "simply one of several factors to be considered in determining relevancy -- albeit a crucial factor." Id.

Although the issue is an open one in the Fourth Circuit, the discussion above evidences that there is considerable authority to support the United States' position that Allen's notes are admissible under Rule 801(d)(1)(B) as substantive evidence -- even assuming arguendo that Allen had a motive to fabricate the substance of the notes when he wrote them. Moreover, the

research conducted by the United States has found no cases where prior consistent statements have not been admitted to rehabilitate a declarant once the court has found that the declarant's credibility has been impeached. See, e.g., Parodi, 703 F.2d 784-87 (Rule 801(d)(1)(B) "includes no such limitation upon admissibility for this limited purpose").

B. ALLEN'S ENTIRE NOTES ARE ADMISSIBLE UNDER  
RULE 801(d)(1)(B) ONCE HE HAS BEEN IMPEACHED

Prior consistent statements are admissible in their entirety as rebuttal evidence under Rule 801(d)(1)(B), even if a defense attorney selectively impeaches the declarant only as to a portion of the declarant's prior statements. United States v. Casoni, 950 F.2d 893, 903 (3d Cir. 1991) ("prior consistent statements are not limited to statements concerning specific inconsistencies brought out on cross-examination"); United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985) (court need not exclude portions of prior consistent statement "that do not relate specifically to matters on which the defendant has been impeached"). Accordingly, Allen's entire notes are admissible to rebut a charge of recent fabrication or improper motive.

Moreover, in the event that the defendants use portions of the notes to impeach Allen's credibility, the notes should be then be admitted in their entirety pursuant to Rule 106 of the Federal Rules of Evidence, which provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other

writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106.

Clearly, traditional notions of fairness support the admission of Allen's notes in their entirety if the defendants use portions of the notes to impeach Allen. See Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1500 (11th Cir. 1987) (entire letter admissible as prior consistent statement under Rule 801(d)(1)(B) and under Rule 106 where defense counsel used portions of the letter to point out inconsistencies with the declarant's trial testimony); United States v. Hall, 739 F.2d 96, 100-101 (2d Cir. 1984) (complaint letter properly admitted where defense counsel suggested that the declarant's trial testimony was inconsistent with the letter on cross-examination).

C. PRIOR CONSISTENT STATEMENTS  
CAN BE INTRODUCED THROUGH ANOTHER WITNESS

It is well settled that a declarant's prior consistent statements can be introduced through the testimony of another witness. Montague, 958 F.2d at 1099. Although Rule 801(d)(1)(B) requires that the declarant be subject to cross-examination, "[the Rule] does not require that the statement be introduced during the witness' direct or redirect testimony in order for the right of cross examination to be exercised." Montague, 958 F.2d at 1099. See United States v. Dominguez, 604 F.2d 304, 311 (4th Cir. 1979), cert. denied sub nom., 439 U.S. 933 (1978). Indeed, only the Seventh Circuit has held to the contrary. See United States v. West, 670 F.2d 675, 687 (7th Cir. 1982).

### III

#### THE NOTES WRITTEN BY ALLEN ARE ADMISSIBLE UNDER RULE 801(d)(1)(B)

A case that is instructive is United States v. Baron, 602 F.2d 1248 (7th Cir. 1979), in which the Seventh Circuit held that memoranda prepared by a government witness documenting certain events (illegal payments and bribes) were admissible as substantive evidence under Rule 801(d)(1)(B). The events memorialized were "essentially the same course of events that [the declarant] testified to at trial." Id. at 1250. On direct examination, the government brought out the reason as to why the notes were made, though the government did not bring out the contents of the memoranda. Id. On direct examination, the declarant testified that "the reason for making the memoranda was that his accountant had advised him to document the [illegal] payments so that he would not have to pay income tax on the [money] that had been withdrawn from the corporate account and was otherwise unaccounted for." Id. On cross-examination, the counsel for the defendant referred to the memoranda extensively, including using the memoranda to bring out inconsistencies between the declarant's trial testimony and the statements contained in the memoranda. Id. On re-direct examination, the Court admitted the memoranda pursuant to Rule 801(d)(1)(B) and allowed copies to be made and given to the jurors. Id. at 1251.

The Court in Baron held that the trial court properly admitted the memoranda, explaining that "Rule 801(d)(1)(B) applies when the witness has been attacked by a charge of recent

fabrication or improper motive, regardless of whether the witness is assaulted through his own prior inconsistent statements." Id. at 1252. The Court found that the declarant had no motive to fabricate when the memoranda were prepared, finding that the memoranda were written "nearly contemporaneously with the events in question" and that the memoranda were prepared for legitimate purposes. Id. at 1253. In addition, the Baron Court concluded that the memoranda were admissible in their entirety pursuant to Rule 106 of the Federal Rules of Evidence.

To be sure, the facts in the instant case are strikingly similar to the facts in Baron. In both cases, the prior consistent statements sought to be introduced to rebut charges of recent fabrication or improper motive are notes written by the declarant. The notes in both cases memorialize events properly characterized as improprieties observed by the declarants. Both Allen and the declarant in Baron made the notes on the advice of someone they trusted: Allen made the notes on the advice of a good friend and mentor; the declarant in Baron made the notes on the advice of his accountant. The notes in both case were written nearly contemporaneously with the events memorialized. In addition, both Allen and the declarant in Baron made the notes for legitimate purposes. Allen clearly had an interest in documenting the improprieties which he observed. If not, Allen would have run the risk of being blamed for the operations of the Beckley, West Virginia plant, since he was the outgoing general manager when the notes were written.

Clearly, Rule 801(d)(1)(B) provides that the notes in question are admissible as prior consistent statements to rebut charges of recent fabrication or improper motive. See, e.g., Baron, 602 F.2d at 1250-53 (memoranda admissible in their entirety as prior consistent statements pursuant to Rule 801(d)(1)(B)); Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1500 (11th Cir. 1987) (letter admissible as prior consistent statement under Rule 801(d)(1)(B)); United States v. Wiggins, 530 F.2d 1018 (D.C. Cir. 1976) (notes of police officer admissible as prior consistent statement to rebut charges of recent fabrication and improper motive).

In the instant case, there is no evidence to suggest that Allen had a motive to fabricate the events documented in his notes at the time such notes were written. Allen will testify that he wrote these notes in September of 1984, almost seven and one half years before the Indictment was returned. In addition, it is ridiculous to argue that Allen fabricated the notes to inculcate defendant Woods in the unlikely event that the Antitrust Division would someday charge defendant Woods with participating in a criminal conspiracy under the Sherman Act. Accordingly, because the defendants cannot show that Allen had a motive to fabricate the prior consistent statements when the notes were written, the notes are clearly admissible as substantive evidence under Rule 801(d)(1)(B) to rebut charges of recent fabrication or improper motive.

Moreover, the United States submits that the better view is for the notes to be admitted as substantive evidence pursuant to Rule 801(d)(1)(B) regardless of whether Allen had a motive to fabricate when the notes were written. See, e.g., Montague, 958 F.2d 1094, 1097-98. The United States submits further that in conjunction with Rule 801(d)(1)(B), Rules 401 and 403 of the Federal Rules of Evidence provide the proper framework for analyzing the admissibility of Allen's notes. See, e.g., Miller, 874 F.2d at 1273-74. In any event, the caselaw in the Fourth Circuit clearly provides that the notes can be used for the purpose of rehabilitating Allen, even if the Court were to find that the notes are not admissible as substantive evidence under Rule 801(d)(1)(B). See Parodi, 703 F.2d at 784-86.

#### IV

#### CONCLUSION

For the foregoing reasons, the notes written by Allen are admissible as substantive evidence under Rule 801(d)(1)(B) to rebut charges of recent fabrication or improper motive. In the

alternative, the notes are admissible to rehabilitate Allen once his credibility has been approached.

Respectfully submitted,

"/s". "

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